YAMAMORI (HONG KONG) LTD.

v.

NOEL KENNETH DAVIDSON & ORS.

HIGH COURT BORNEO, KOTA KINABALU
MOHD. NOOR AHMAD J
[CIVIL SUIT NO. T.K.524 OF 1988]
9 NOVEMBER 1989

COMPANY LAW: *Transfer of shares to plaintiff - Defendants challenge the validity of the transfer - Whether formal proof necessary - Presumption of regularity - Action by plaintiffs seeking to declare defendants appointment of it's nominees null and void - Preliminary objection - Whether defendants have locus standi to challenge validity of the transfer - Sections 5, 100 of the Companies Act 1965.*

Defendant 1 was appointed Receiver of Hiew Fook Realty (Holdings) Sdn. Bhd. (HFR). Another company, Hiew Fook Realty Plantations Sdn. Bhd. (HFP) is a wholly owned subsidiary of HFR.

HFR in turn wholly owned a subsidiary called Borneo Hotels Sdn. Bhd. (BHSB). By virtue of the provisions of s. 5 of the Companies Act 1965, BHSB is a subsidiary of HFR. That being the case, the BHSB shares are the assets of HFR which form part of the first floating charge created by HFR in favour of the creditor bank.

On his appointment as Receiver, the 1st defendant called for an EGM of BHSB on 14 March 1988 wherein the old directors were removed and replaced by defendant 1 and 2. Defendant 3 was subsequently appointed as an additional director. Defendants 2 and 3 are also partners in defendant 4.

The plaintiff contend however that on 29 October 1985 the whole of the shares in BHSB were transferred to itself by the then old directors of BHSB and as a result the plaintiffs have complete domain over the said shares.

In this action, the plaintiffs claim against the defendants:

(1) A declaration that the extraordinary general meeting of Borneo Hotel Sendirian Berhad (hereinafter referred to as "BHSB") held on 14 March 1988 is invalid, null and void and of no effect;

(2) A declaration that the appointment of the 1st, 2nd and 3rd defendants as company directors of BHSB is invalid, null and void and of no effect;

(3) A declaration that Datuk Hiew Min Yong, Hiew Min Hand and Hiew Min Hoi are and continue to be the lawful company directors of BHSB;

(4) An injunction to restrain the 1st, 2nd and 3rd defendants by themselves or by their servants or agents or otherwise from acting or continue to act in any manner and howsoever as company directors of BHSB;

(5) An injunction to restrain the 4th defendant by themselves or by their servants or agents or otherwise from taking instructions or continue to take instructions from the 1st, 2nd and 3rd defendants as company directors of BHSB on all matters whatsoever and restrain them from selling by tender or otherwise or deal with in any manner the property of BHSB known as the Borneo Hotel erected on Kota Kinabalu Town Lease No. 015106251.

The plaintiff challenged the validity of the defendants appointments as new directors. The defendants in defending their appointment seek to challenge the validity of the alleged transfer of shares to the plaintiffs.

Held:

[1] As the share certificates bear the common seal of the BHSB and the signatures of its then directors and the stamping work dated 29 October 1985 the presumption of regularity may be applied to it and as such the said share certificate need not be formally proved further.

[2] On the authority of *Day v. William Hill* it is open to the Court to look at the said certificates without the necessity of formal proof and by virtue of s. 100 of the Companies Act 1965, the said share certificate is accepted as *prima facie* evidence of the title of the plaintiff to the shares.

[3] The defendants in order to maintain their defences relating to their challenge on the validity of the alleged share transfer must have an interest in BHSB, however as they are not shareholders, they are strangers as far as BHSB and the plaintiff are concerned. Hence they lack the legal capacity to attack the validity of the share certificate.

[4] Even if the defendants stand as shareholders of HFP, which wholly owns BHSB, the defendants have no right, legal or equitable, to the property of HFP. As HFP owned the said shares in BHSB, HFP is the proper person to complain, in which case HFP should have been brought in as a party.

[5] The defendants are incompetent to challenge the validity of the transfer of shares to the plaintiff and have no *locus standi* to maintain their defence in its present form.

[Order accordingly.]

Cases referred to:

Day v. William Hill [1949] 1 All ER 219
Bhikku Daeng v. Maung Shwee Tyn [1980] 2 MLJ 184
Chik Binti Abdullah v. Itam Binti Saad [1974] I MLJ 221
Macaura v. Northern Assurance Co. [1925] AC 619
Yeng Hing Enterprises v. Liow Su Fah [1979] 2 MLJ 240
Prudential Assurance v. Newman Industries (No. 2) [1982] 1 All ER 354

Legislation referred to:

Companies Act 1965, ss. 5, 100

For the plaintiffs - Sethu and Peter Soong; M/s. Lawrence Chain & Peter Soong
For the defendants - Noel Kenneth Davidson, (A. Decena and Nobert Yapp with him); M/s. Jayasuria Kah & Co.

JUDGMENT

Mohd. Noor Ahmad J:

In this action, the plaintiffs claim against the defendants, *inter alia*, the following:

(1) A declaration that the extraordinary general meeting of Borneo Hotel Sendirian Berhad (hereinafter referred to as "BHSB") held on 14 March 1988 is invalid, null and void and of no effect;

(2) A declaration that the appointment of the 1st, 2nd and 3rd defendants as company directors of BHSB is invalid, null and void and of no effect;

(3) A declaration that Datuk Hiew Min Yong, Hiew Min Hand and Hiew Min Hoi are and continue to be the lawful company directors of BHSB;

(4) An injunction to restrain the 1st, 2nd and 3rd defendants by themselves or by their servants or agents or otherwise from acting or continue to act in any manner and howsoever as company directors of BHSB;

(5) An injunction to restrain the 4th defendant by themselves or by their servants or agents or otherwise from taking instructions or continue to take instructions from the 1st, 2nd and 3rd defendants as company directors of BHSB on all matters whatsoever and restrain them from selling by tender or otherwise or deal with in any manner the property of BHSB known as The Borneo Hotel erected on Kota Kinabalu Town Lease No. 015106251.

Briefly, the undisputed facts are as follows:

(1) The plaintiffs are incorporated as a company in the British Colony of Hong Kong. Defendant 1, a partner in defendants 4, was appointed receiver of Hiew Fook Realty (Holdings) Sdn. Bhd. (hereinafter referred to as "HFR") pursuant to a series of debenture issued by HFR in favour of the Standard Chartered Bank (hereinafter referred to as "the bank") to secure banking facilities. Hiew Fook Realty Plantations Sdn. Bhd. (hereinafter referred to as "HFP" is a wholly owned subsidiary of HFR and that BHSB is a wholly owned subsidiary of HFP and by virtue of the provisions of s. 5 of the Companies Act 1965. BHSB shares, the crux of the dispute, are the assets of HFR which form part of the first floating charge created by HFR in favour of the bank.

(2) Pursuant to an order of Court an extraordinary general meeting of BHSB was called for the purpose of removing the then board of directors and replacing them with defendant 1's nominees. At the said meeting on 14 March 1988, the old directors (including Datuk Hiew Min Yong) were removed and replaced by defendants 1 and 2. Defendant 3 was subsequently appointed as an additional director. Defendants 2 and 3 are also partners in defendants 4.

(3) The total number shares issued by BHSB is 11,200 ordinary shares of RM1 each. That represents its total paid-up share capital.

The plaintiffs contend that by reason of transfer of the whole BHSB shares to itself by the then directors of HFP on 29 October 1985, BHSB is a wholly owned subsidiary of the plaintiffs who have complete domain over the said shares. The share certificate was produced in support thereof (per Ex. SEB1 as exhibited in the affidavit of Susan Elizabeth Beach affirmed on 21 October 1988, for the purpose of the interlocutory application). However, the defendants dispute this, contending that according to the record of the statutory books of BHSB at the time when defendant 1 was appointed Receiver the alleged transfer of shares never took place.

At the commencement of the trial, the plaintiffs' Counsel raised a preliminary issue as to whether the defendants by themselves can now challenge the validity of the alleged transfer of shares.

In this action the plaintiffs had selected the said defendants and challenged their status as directors of BHSB and that the said defendants are defending the validity of their appointments. It is true that the said defendants can defend the validity of their appointments and there is no authority to say otherwise. And, as contended by the defendants' Counsel, since para. 2(f) of the statement of defence had been withdrawn only the validity of the said defendants' appointment is in issue. However, it is without doubt that the said defendants

in defending their appointments seek, in effect, to challenge the validity of the alleged transfer of shares to the plaintiffs. Therefore, the issue for my consideration is whether the said defendants by themselves can do so now in the present form of action.

It is necessary to determine first whether the impugned share certificate (Ex. SEB1) should be accepted as *prima facie* evidence of the title of the plaintiffs to the shares without formal proof. It is obvious that the said certificate bears the common seal of the company (BHSB) and the signature of its then directors and the stamping mark dated 29 October 1985 appear therein. On these facts, presumption of regularity may be applied to it. For the aforesaid reasons, it is my view that the said certificates need not be formally proved further. And, as ownership of the said shares is pleaded in para. 2 of the statement of claim, on the authority of *Day v. William Hill* [1949] 1 AER 219, it is open to the Court to look at the said certificate without the necessity of formal proof. Therefore, by virtue of the provision of s. 100 of the Companies Act 1965, the said certificate is accepted as *prima facie* evidence of the title of the plaintiffs to the shares.

That being the case, it is necessary for the said defendants to have an interest in BHSB in order to maintain their defences relating to their challenge on the validity of the alleged share transfer. (*Bhikku Daeng v. Maung Shwee Tyn* [1980] 2 MLJ 184 and *Chik Binti Abdullah v. Itam Binti Saad* [1974] 1 MLJ 221). As the said defendants are not the shareholders of the BHSB, they are strangers so far as BHSB and the plaintiffs are concerned. Hence, they lack the legal capacity to attack the validity of the share certificate. Further, the shares in BHSB until the alleged transfer was the property of HFP. Assuming that the said defendants' stand as shareholders of HFP, they have no right, legal or equitable, to the property of HFP (*Macaura v. Northern Assurance Co.* [1925] AC 619 and *Yeng Hing Enterprises v. Liow Su Fah* [1979] 2 MLJ 240. Hence, they cannot complain against the alleged transfer of the shares which was then the property of HFP. As HFP owned the said shares (in BHSB) HFP is the proper person to complain. (*Walter Woon on Company Law* pp. 225-226 and *Prudential Assurance v. Newman Industries* (No. 2) [1982] 1 AER 354).

In the final analysis, I conclude that the said defendants are incompetent to challenge the validity of the alleged transfer as raised in their defence i.e., they do not have the *locus standi* to maintain their defence in its present form. The said defendants as directors of BHSB cannot dispute the plaintiffs' right as shareholder. Only the shareholders of BHSB, i.e., HFP can do so, in which case HFP should have been brought in as a party.

Therefore, the preliminary objection is hereby sustained.

Also found at [1990] 1 CLJ 580